Nassau Maritime Holdings Designated Activity Co v The owners of the ship or vessel 'Cape Lambert' of the Port of Marshall Islands

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO WA-27NCC-32–03 OF 2020
ATAN MUSTAFFA JC
24 AUGUST 2020

Civil Procedure — Admiralty — Loan agreement for construction of vessel — High Court granted warrant of arrest in favour of plaintiff — Whether defendant filed application to declare wrongful arrest of vessel — Whether there was breach of loan agreement by defendant — Rules of Court 2012 O 12 r 10(1) & 10(3)

Civil Procedure — Admiralty — Jurisdiction — Action in rem — High Court granted warrant of arrest in favour of plaintiff — Whether plaintiff's action in rem valid — Whether plaintiff's action within jurisdiction of High Court of Malaya — Courts of Judicature Act 1964 ss 23 & 24(b) — Senior Courts Act 1981 s 21

This was the defendant's application ('encl 13') pursuant to O 12 r 10(1) and 10(3) of the Rules of Court 2012 for, inter alia, for the declaration that: (a) the admiralty jurisdiction of the court was wrongfully and/or improperly invoked on the vessel 'Cape Lambert' ('the vessel'); (b) a declaration that the arrest of the vessel on was wrongful; (c) an order to set aside the service of the writ in an action in rem issued by the High Court of Malaya at Kuala Lumpur against the vessel ('the writ in rem'); and an order to set aside the service of the warrant of arrest issued by the High Court of Malaya at Kuala Lumpur against the vessel ('the warrant of arrest') and that the warrant of arrest was discharged. On 15 May 2008, HSH Nordbank ('the lender') and seven borrowers, including the defendant, Lambert Navigation Ltd, a corporation existing under the laws of Marshall Islands, entered into a written agreement of loan terms ('the loan agreement') wherein the lender agreed to refinance the borrowers' collective obligations under certain existing loan agreements in respect of the construction of certain vessels identified therein which includes the vessel. The loan agreement was governed by the law of the Federal Republic of Germany and subject to the jurisdiction of the courts of Hamburg in the Federal Republic of Germany. As security for its joint and several obligations under the loan agreement, the defendant in a first preferred mortgage dated 31 December 2009 ('the mortgage') entered into between the lender and the defendant acknowledged that it was justly, jointly and severally liable to the plaintiff under the loan agreement, and that it had entered into the mortgage to secure

payment of the sums owed under the loan agreement and interest thereupon, and to secure the performance and observance of and compliance with all of the agreements, covenants and conditions in the mortgage and in the loan agreement. On 21 June 2019, the lender assigned the mortgage to Promontoria Maritime Holding Designated Activity Co ('Promontoria Maritime'). The lender assigned all its rights and obligations arising under the loan agreement under an assignment ('the loan assignment agreement') to Promontoria Maritime. Promontoria Maritime then changed its name to Nassau Maritime Holdings Designated Activity Co, the plaintiff named in the present suit. The plaintiff contended that the defendant breached the loan agreement and the mortgage when the defendant failed to make a certain payment in respect of the loan agreement when due which constituted an event of default under the loan agreement and the mortgage. The loan agreement was terminated and the sums outstanding under the loan agreement and the mortgage were demanded from the defendant and the other borrowers. The payments were not forthcoming and the plaintiff regarded the defendant and the other borrowers to be in breach of the loan agreement and of the mortgage. The plaintiff, as mortgagee, filed the writ in rem on 28 March 2020 against the vessel to claim against the defendant, as owners of the vessel, for breach of the loan agreement, mortgage, assignment of mortgage and loan assignment agreement dated 21 June 2019, inter alia, for the sum of USD24,538,314.51 in respect of the principal claim amount as at 12 March 2020 and the sum of USD378,588.02 as contractual interest on the principal claim amount as at 12 March 2020. The plaintiff requested for the issuance of a warrant of arrest against the vessel by way of a praecipe for the warrant of arrest. The warrant of arrest was then issued on 30 March 2020. The writ in rem and warrant of arrest was executed against the vessel in the Labuan waters on 30 March 2020. The defendant then filed in its appearance on 1 April 2020. This application (enclosure 13) was subsequently filed on 10 April 2020. The plaintiff contended that the plaintiff rightly brought the admiralty action in rem in the High Court of Malaya at Kuala Lumpur against the vessel by virtue of s 24(b) of the Courts of Judicature Act 1964 ('the Act') read together with s 23 of the Act and s 20(1)(a) of the Senior Courts Act 1981 ('the UK SCA') it was further contended that the service of the writ in rem and execution of the warrant of arrest by the sheriff to enforce the plaintiff's claim in rem on the vessel at Labuan were proper as there was no concept or requirement for invocation of admiralty jurisdiction prescribed under the Act or the UK SCA in order for the High Court in Malaya to hear and determine the dispute on the merits in an admiralty action in rem.

Held, dismissing the defendant's application in encl 13 with costs of RM15,000:

(1) By sub-ss (2) and (3) of s 21 of the UK SCA, an action in rem could be brought against the vessel without considering who the owner of the vessel was at the time the writ in rem was issued, or who would be liable

in personam when the cause of action arose. They were proprietary rights attached on the relevant vessel from the moment of their creation. The claims were truly in rem because they arose and were enforced irrespective of ownership or personal liability criteria unlike claims under s 21(4) of the UK SCA. The court could exercise its in rem jurisdiction against the vessel pursuant to s 21(2) and (3) of the UK SCA. Since the plaintiff's action related to claim or questions under s 20(2)(c), an action in rem may be brought in the High Court against the vessel or property in connection with which the claim or question arises. Despite the vessel was not within the territorial waters or local jurisdiction of either High Court in Malaysia, it was not proper for the High Court to issue an admiralty writ in rem against the vessel (see paras 18–19).

(2) The contention of the defendant that the High Court in Malaya had no local jurisdiction to try civil proceedings where the vessel was arrested by the sheriff in the waters of Labuan Federal Territory was incorrect as the four factors or criteria of jurisdictional facts required to come within the local jurisdiction of either of the High Court in Malaya or High Court in Sabah and Sarawak under s 23(a)–(d) and 3 of the Act were not applicable in the admiralty in rem action in the present case. As upon issuance of the writ in rem, the High Court in Malaya already had pre-existing admiralty jurisdiction over the vessel. The venue, location or whereabouts of the vessel at the time of the service of the writ in rem or execution of the warrant of arrest by the High Court sheriff on the vessel did not displace or nullify the court's admiralty jurisdiction in the issuance of the writ in rem or warrant of arrest or enforcement thereof in respect of the plaintiff's in rem claim against the vessel. The contention of the defendant that the invocation of the jurisdiction of the High Court in Malaya was done in the local jurisdiction of the High Court in Sabah and Sarawak where the writ in rem was served on the vessel was wrong (see paras 23 & 33–34).

(3) The writ in rem and warrant of arrest although issued out of the High Court in Malaya was served and executed in the waters of Labuan. Despite not being served and executed within the territorial jurisdiction of the High Court in Malaya, the service and execution of the writ in rem and warrant of arrest was proper as by virtue of s 7(2) of the Act. The word jurisdiction in s 7(2) of the Act referred to the jurisdiction of the Federal Court, Court of Appeal and the two High Courts and not the local jurisdiction as defined in s 3 of the Act. The plaintiff's claim under the writ in rem was a cause or matter within the admiralty jurisdiction of the court. Once the court sealed Writ in rem and warrant of arrest are expressed to be issued in the name of the Chief Judge of the High Court in the name of Yang di-Pertuan Agong pursuant to s 7(1) of the Act, both the writ in rem and warrant of arrest shall have full force and effect and may be served or executed anywhere within Malaysia (see paras 54–55).

[Bahasa Malaysia summary

Ini adalah permohonan defendan ('lampiran 13') menurut A 12 k 10(1) dan 10(3) Kaedah-Kaedah Mahkamah 2012 untuk, antara lain, pengisytiharan bahawa: (a) bidang kuasa pengadilan admiralti adalah salah dan/atau telah disalah guna terhadap kapal 'Cape Lambert' ('kapal tersebut'); (b) perisytiharan bahawa tahanan kapal tersebut salah; (c) satu perintah untuk mengenepikan writ di dalam tuntutan secara rem dikeluarkan oleh Mahkamah Tinggi Malaya di Kuala Lumpur terhadap kapal tersebut ('writ secara rem'); dan (d) satu perintah untuk mengenepikan penyampaian waran tangkap yang dikeluarkan oleh Mahkamah Tinggi Malaya di Kuala Lumpur terhadap kapal tersebut ('waran tangkap') dan bahawa waran tangkap itu telah dibatalkan. Pada 15 Mei 2008, HSH Nordbank ('pemberi pinjam') dan tujuh peminjam, termasuk defendan, Lambert Navigation Ltd, sebuah syarikat yang ditubuhkan berdasarkan undang-undang Kepulauan Marshall, telah memasuki satu perjanjian bertulis berkenaan syarat pinjaman ('perjanjian pinjaman') di mana pemberi pinjam telah bersetuju untuk membiayai semula tanggungjawab kolektif peminjam di bawah perjanjian pinjaman tertentu yang berkenaan dengan pembinaan kapal tertentu yang dikenal pasti di dalamnya termasuk kapal tersebut. Perjanjian pinjaman tersebut adalah di bawah kuasa undang-undang Republik Persekutuan Jerman dan tertakluk kepada bidang kuasa pengadilan Hamburg di Republik Persekutuan Jerman. Sebagai sekuriti kepada kewajipan bersama dan berasingan di bawah perjanjian pinjaman, defendan dalam gadai janji pilihan pertama bertarikh 31 Disember 2009 ('gadai janji') yang dimeterai di antara pemberi pinjam dan defendan mengakui bahawa ia bertanggungjawab secara adil, bersama dan berasingan kepada plaintif di bawah perjanjian pinjaman, dan bahawa ia telah membuat gadai janji untuk menjamin pembayaran jumlah yang terhutang di bawah perjanjian pinjaman dan faedah di atasnya, dan untuk menjamin perlaksanaan dan pematuhan terhadap semua perjanjian, perjanjian dan syarat dalam gadai janji dan dalam perjanjian pinjaman. Pada 21 Jun 2019, pemberi pinjam telah memberikan gadai janji kepada Promontoria Maritime Holding Designated Activity Co ('Promontoria Maritime'). Pemberi pinjam telah memberikan semua hak dan kewajipannya yang terdapat dalam perjanjian pinjaman di bawah satu penyerahan hak ('perjanjian penyerahan pinjaman') kepada Promontoria Maritime. Promontoria Maritime kemudian telah menukar namanya kepada Nassau Maritime Holdings Designated Activity Co, plaintif yang dinamakan di dalam tindakan ini. Plaintif menyatakan bahawa defendan telah melanggar perjanjian pinjaman dan gadai janji apabila defendan gagal membuat pembayaran tertentu bagi perjanjian pinjaman tersebut dalam tempoh masa yang ditetapkan yang merupakan satu keingkaran di bawah perjanjian pinjaman dan gadai janji. Perjanjian pinjaman ditamatkan dan jumlah yang tertunggak di bawah perjanjian pinjaman dan gadai janji adalah dituntut daripada defendan dan peminjam yang lain. Tiada pembayaran yang diterima dan plaintif menganggap defendan dan peminjam lain telah

melanggar perjanjian pinjaman dan gadai janji. Plaintif, sebagai penggadai janji, memfailkan writ secara rem pada 28 Mac 2020 terhadap kapal tersebut untuk menuntut terhadap defendan, sebagai pemilik kapal, kerana melanggar perjanjian pinjaman, gadai janji, penyerahan gadai janji dan perjanjian penyerahan pinjaman bertarikh 21 Jun 2019 , antara lain, untuk jumlah USD24,538,314.51 berkenaan dengan jumlah tuntutan prinsipal pada 12 Mac 2020 dan jumlah USD378,588.02 sebagai faedah melalui kontrak ke atas jumlah tuntutan prinsipal setakat 12 Mac 2020. Plaintif meminta waran tangkap dikeluarkan terhadap kapal tersebut melalui satu Praecipe untuk waran tangkap. Waran tangkap kemudian dikeluarkan pada 30 Mac 2020. Writ secara rem dan waran tangkap dilaksanakan terhadap kapal di perairan Labuan pada 30 Mac 2020. Defendan kemudian memfailkan kehadirannya pada 1 April 2020. Permohonan ini (lampiran 13) kemudiannya difailkan pada 10 April 2020. Plaintif menyatakan bahawa plaintif dengan tepat membawa tindakan admiralti secara rem di Mahkamah Tinggi Malaya di Kuala Lumpur terhadap kapal tersebut berdasarkan s 24(b) Akta Mahkamah Kehakiman 1964 ('Akta') dibaca bersama dengan s 23 Akta dan s 20(1)(a) Senior Courts Act 1981 ('UK SCA'). Selanjutnya adalah dipertikaikan bahawa penyampaian writ secara rem dan pelaksanaan waran tangkap oleh sheriff untuk melaksanakan tuntutan terhadap kapal tersebut di Labuan adalah wajar kerana tidak ada konsep atau syarat untuk memohon bidang kuasa admiralti yang ditentukan di bawah Akta atau UK SCA untuk Mahkamah Tinggi Malaya untuk mendengar dan menentukan pertikaian mengenai merit dalam tindakan admiralti secara rem.

Diputuskan, menolak permohonan defendan di lampiran 13 dengan kos sebanyak RM15,000:

(1) Di bawah sub-ss (2) dan (3) dari s 21 UK SCA, tindakan secara rem boleh dimulakan terhadap kapal tersebut tanpa mempertimbangkan siapa pemilik kapal semasa writ secara rem dikeluarkan, atau siapa yang akan bertanggungjawab secara personam apabila terdapat kausa tindakan. Ianya adalah merupakan hak milik kapal yang relevan sejak penciptaannya. Tuntutan tersebut benar-benar secara rem kerana ia timbul dan dikuatkuasakan tanpa mengira kriteria pemilikan atau tanggungjawab peribadi tidak seperti tuntutan di bawah s 21(4) UK SCA. Mahkamah boleh menjalankan bidang kuasa rem terhadap kapal berdasarkan s 21(2) dan (3) SCA UK. Oleh kerana tindakan plaintif adalah berkaitan dengan tuntutan atau persoalan di bawah s 20(2)(c), satu tindakan secara rem dapat dibawa atau dimulakan di Mahkamah Tinggi terhadap kapal tersebut atau harta benda yang terkait dengan tuntutan atau persoalan tersebut. Walaupun kapal tersebut tidak berada di perairan wilayah atau bidang kuasa tempatan mana-mana Mahkamah Tinggi di Malaysia, Mahkamah Tinggi tidak wajar mengeluarkan writ admiralti secara rem terhadap kapal tersebut (lihat perenggan 18–19).

(2) Dakwaan defendan bahawa Mahkamah Tinggi di Malaya tidak mempunyai bidang kuasa tempatan untuk mengadili prosiding sivil di mana kapal tersebut ditahan oleh sheriff di perairan Wilayah Persekutuan Labuan adalah tidak benar memandangkan empat faktor atau kriteria berkenaan fakta bidang kuasa yang diperlukan untuk masuk dalam bidang kuasa tempatan sama ada Mahkamah Tinggi Malaya atau Mahkamah Tinggi di Sabah dan Sarawak di bawah s 23(a)–(d) dan 3 Akta tersebut adalah tidak terpakai dalam tindakan admiralti secara rem dalam tindakan kes ini. Sebagaimana dikeluarkan dalam writ secara rem, Mahkamah Tinggi Malaya telah memiliki pra-bidang kuasa admiralti (bidang kuasa sebelumnya) ke atas kapal tersebut. Tempat, lokasi atau keberadaan kapal tersebut pada masa penyampaian writ secara rem atau pelaksanaan waran tangkap oleh sheriff Mahkamah Tinggi ke atas kapal tersebut tidak menggantikan atau membatalkan bidang kuasa admiralti mahkamah berkenaan ganti rugi atau waran tangkap atau penguatkuasaannya berkenaan dengan tuntutan plaintif secara rem terhadap kapal tersebut. Defendan menyatakan bahawa bidang kuasa Mahkamah Tinggi Malaya yang diguna pakai dalam bidang kuasa tempatan Mahkamah Tinggi di Sabah dan Sarawak di mana writ secara rem telah diserahkan terhadap kapal tersebut adalah salah (lihat perenggan 23 & 33–34).

(3) Writ secara rem dan waran tangkap walaupun dikeluarkan oleh Mahkamah Tinggi di Malaya telah diserahkan dan dilaksanakan di perairan Labuan. Meskipun tidak diserahkan dan dilaksanakan di dalam bidang kuasa Mahkamah Tinggi Malaya, namun pelaksanaan dan pelaksanaan writ secara rem dan waran tangkap adalah teratur berdasarkan s 7(2) Akta tersebut. Istilah bidang kuasa di bawah s 7(2) Akta tersebut merujuk kepada bidang kuasa Mahkamah Persekutuan, Mahkamah Rayuan dan dua Mahkamah Tinggi dan bukan bidang kuasa tempatan seperti yang didefinisikan dalam s 3 Akta tersebut. Tuntutan plaintif melalui writ secara rem adalah perkara di bawah bidang kuasa admiralti mahkamah. Setelah mahkamah memeteraikan writ secara rem dan waran tangkap dinyatakan dikeluarkan di atas nama Ketua Hakim Mahkamah Tinggi atas nama Yang di-Pertuan Agong menurut s 7(1) Akta tersebut, kedua-dua writ secara rem dan waran tangkap adalah terpakai dan berkuat kuasa dan boleh diserahkan atau dilaksanakan di mana sahaja di dalam Malaysia (lihat perenggan 54–55).]

Cases referred to

Aro Co Ltd, Re [1980] 1 All ER 1067, CA (refd)

Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd [2003] 5 MLJ 40; [2003] 1 CLJ 450, HC (refd)

En Norske Bank Asa v The Owners of the Ship or Vessel 'Forum Akasaka' and third party [1998] MLJU 55, HC (distd)

A *Fordeco Nos 12 and 17, The ; the owners of and all other persons interested in the ships Fordeco No 12 and Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, the owners of the ship MV Xin Hua 10* [2000] 1 MLJ 449, FC (distd)
Fung Beng Tiat v Marid Construction Co [1996] 2 MLJ 413, FC (distd)
Good Herald, The [1987] 1 Lloyd's Rep 236, QBD (not folld)
B *Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor* [2016] 3 MLJ 553, FC (distd)
Indian Endurance (No 2), The; Republic of India and another v India Steamship Co Ltd [1997] 4 All ER 380, HL (distd)
Monica S, The [1967] 2 Lloyd's Rep 113 (refd)
C *Nord Sea and Freccia del Nord, The* [1989] 1 Lloyd's Rep 388 (not folld)
Pantai Bayu Emas Sdn Bhd & Ors v Southern Bank Bhd [2009] 3 MLJ 745; [2009] 2 CLJ 630, FC (folld)
'The Fierbinti'; Romline SA Shipping Co v Owners of Cargo lately laden on board the ship or vessel 'Fierbinti' [1994] 3 SLR 864, CA (distd)
D *Wei Hsing Food (S) Pte Ltd v The owners or demise charterers of the ship or vessel 'The Neptune' and another action* [2005] 5 MLJ 702, HC (distd)

Legislation referred to

E Admiralty Act 1973 [NZ]
Administration of Justice Act 1956 [UK] s 3
Civil Jurisdiction and Judgments Act 1982 [UK] s 34
Courts of Judicature Act 1964 s 3, 7, 7(1), (2), 12, 20(2)(c), 23, 23(1), (1)(a), (1)(b), (1)(c), (1)(d), 24, 24(b), 25(1), (2), Schedule
F Federal Constitution art 121(3)
High Court (Admiralty Jurisdiction) Act [SG]
Rules of Court 2012 O 12 r 10(1), (3), O 70 rr 7, 9, 10
Senior Courts Act 1981 [UK] 20, 20(1)(a), (2), (2)(c), (7) , 21, 21(2), (3), (4), (8), 22, 23, 24

G *Mathew Kurien (Aaron Siva with him) (Sativale Mathew Arun) for the plaintiff.*
Sivakumar Kanagasabai (Trishelea Ann Sandosam and Balamurali Tamilwanan with him) (Skrine) for the defendant.

H **Atan Mustaffa JC:**

INTRODUCTION

[1] This judgment concerns the defendant's application (encl 13) pursuant I to O 12 r 10(1) and 10(3) of the Rules of Court 2012 for, inter alia, the following:

(a) a declaration that the admiralty jurisdiction of this court was wrongfully and/or improperly invoked on the vessel 'Cape Lambert' ('the vessel') on 30 March 2020;

(b) a declaration that the arrest of the vessel on 30 March 2020 is wrongful; A

(c) an order to set aside the service of the writ in an action in rem issued by the High Court of Malaya at Kuala Lumpur dated 28 March 2020 against the vessel ('the writ in rem'); and

(d) an order to set aside the service of the warrant of arrest issued by the High Court of Malaya at Kuala Lumpur against the vessel on 30 March 2020 ('the warrant of arrest'), and that the warrant of arrest be discharged. B

SALIENT BACKGROUND FACTS C

[2] To appreciate the foreign flavour of the issues involved, I first set out the background facts of the plaintiff's claim which are gleaned from the statement of claim and the affidavit leading to the warrant of arrest. D

[3] On 15 May 2008, HSH Nordbank ('the lender') and seven borrowers, including the defendant, Lambert Navigation Ltd, a corporation existing under the laws of Marshall Islands, entered into a written agreement of loan terms ('the loan agreement') wherein the lender agreed to refinance the borrowers' collective obligations under certain existing loan agreements in respect of the construction of certain vessels identified therein which includes the vessel. The loan agreement is governed by the law of the Federal Republic of Germany and subject to the jurisdiction of the courts of Hamburg in the Federal Republic of Germany. E F

[4] As security for its joint and several obligations under the loan agreement, the defendant in a first preferred mortgage dated 31 December 2009 ('the mortgage') entered into between the lender and the defendant acknowledged that it was justly, jointly and severally liable to the plaintiff under the loan agreement, and that it had entered into the mortgage to secure payment of the sums owed under the loan agreement and interest thereupon, and to secure the performance and observance of and compliance with all of the agreements, covenants and conditions in the mortgage and in the loan agreement. G H

[5] A salient term of the mortgage is that the mortgagee shall have the right to exercise all of the rights and remedies in foreclosure and otherwise given to mortgagees by the provisions of the law of the Republic of the Marshall Islands or of any other jurisdiction where the vessel may be found and bring suit at law, in equity or in admiralty, to recover judgment for the indebtedness of the defendant. The mortgage is governed by and construed with Marshall Islands law. The vessel is flagged and operated under the laws of the flag state of Marshall Islands. I

[6] On 21 June 2019, the lender assigned the mortgage to Promontoria Maritime Holding Designated Activity Co ('Promontoria Maritime'). Also on 21 June 2019, the lender assigned all its rights and obligations arising under the loan agreement under an assignment ('the loan assignment agreement') to Promontoria Maritime, an Irish company with its registered address in Dublin, Ireland. Promontoria Maritime then changed its name to Nassau Maritime Holdings Designated Activity Co, the plaintiff named in this suit, on 9 January 2020. In this suit the plaintiff is proceeding as lender under the loan agreement and mortgagee under the mortgage.

[7] The plaintiff contended that the defendant breached the loan agreement and the mortgage when the defendant failed, among other things, to make a certain payment in respect of the loan agreement when due which constituted an event of default under the loan agreement and the mortgage. Subsequently, the loan agreement was terminated and the sums outstanding under the loan agreement and the mortgage were demanded from the defendant and the other borrowers. The payments were not forthcoming and the plaintiff regarded the defendant and the other borrowers to be in breach of the loan agreement and of the mortgage.

[8] The plaintiff, as mortgagee, filed the writ in rem on 28 March 2020 against the vessel to claim against the defendant, as owners of the vessel, for breach of the loan agreement, mortgage, assignment of mortgage dated 21 March 2019 and loan assignment agreement dated 21 June 2019, inter alia, for the sum of USD24,538,314.51 in respect of the principal claim amount as at 12 March 2020 and the sum of USD378,588.02 as contractual interest on the principal claim amount as at 12 March 2020.

[9] On 28 March 2020. The plaintiff also requested for the issuance of a warrant of arrest against the vessel by way of a praecipe for the warrant of arrest. The warrant of arrest was then issued on 30 March 2020. The writ in rem and warrant of arrest was executed against the vessel in the Labuan waters on 30 March 2020. The defendant then filed in its appearance on 1 April 2020.

[10] This application (encl 13) was subsequently filed on 10 April 2020.

THE COURT'S ADMIRALTY JURISDICTION

[11] A valuable starting point must be the basis under which a litigant can bring an admiralty action in rem in the High Court. It is clear that the jurisdiction of the court in respect of an admiralty action comes stems from s 24(b) of the Courts of Judicature Act 1964 ('the CJA') which provides that the civil jurisdiction of the court shall include the same jurisdiction and authority in relation to matters of admiralty as is heard by the High Court of Justice in

England under the United Kingdom Supreme Court Act 1981, now known as Senior Courts Act 1981 ('the UK SCA'). Section 20 of the UK SCA, inter alia, provides that the admiralty jurisdiction of the court shall include the jurisdiction to hear and determine any of the questions as mentioned in s 20(2) which includes any claim in respect of a mortgage of or charge on a ship or any share therein (see s 20(2)(c) of the CJA).

[12] The mode of exercise of the admiralty jurisdiction is prescribed in s 21 of the UK SCA which provides:

> 21 Mode of exercise of admiralty jurisdiction
>
> (1) Subject to section 22, an action in personam may be brought in the High Court in all cases within the admiralty jurisdiction of that court.
>
> (2) In the case of any such claim as is mentioned in section 20(2)(a), (c) or (s) or any such question as is mentioned in section 20(2)(b), an action in rem may be brought in the High Court against the ship or property in connection with which the claim or question arises.
>
> (3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property.

[13] Of particular note, in the instant case, where the claim is in respect of a mortgage of a ship the particular mode of exercise of the admiralty jurisdiction is prescribed by s 21(2) which states that where the claim is mentioned in s 20(2)(c) (a mortgage claim) an action in rem may be brought in the High Court against the ship or property in connection with which the claim or question arises. Here, the plaintiff's action in rem can be brought against the vessel without considering who the owner of the vessel is at the time the writ in rem is issued, or who would be liable I when the cause of action arose. The claim is thus considered to be a truly in rem claim.

[14] As this claim involves a foreign vessel and the mortgage is governed by and construed with Marshall Islands law, it is also important to note the provisions of s 20(7) of the UK SCA. It provides that s 20 shall apply in relation to all ships of whatever flag and in relation to mortgages created under foreign law. This removes any objection to jurisdiction based on the foreign connections specified in it. The upshot of this is this court is competent to hear and determine the dispute in relation to the mortgage claim in this action.

THE DEFENDANT'S SUBMISSIONS

[15] The defendant, represented by Mr Siva Kumar Kanagasabai, submitted that the admiralty jurisdiction of the High Court in Malaya was wrongly and/or improperly invoked by the plaintiff in this action by the service, on 30 March 2020, of the writ in rem and warrant of arrest issued by the High

Court of Malaya at Kuala Lumpur on the vessel which was located in the Federal Territory of Labuan, outside the local jurisdiction of the High Court in Malaya as prescribed under ss 23 and 3 of the CJA. For this reason the defendant contended the service of the writ in rem and warrant of arrest ought to be be set aside. This submission is premised on the contentions of the defendant which can be summarised as follows:

(a) the admiralty jurisdiction of the High Court is only invoked when the writ in rem or the warrant of arrest is served on the vessel and the admiralty jurisdiction can only be invoked within the High Court's territorial jurisdiction;

(b) s 23 read with s 3 of the CJA provide that the territorial waters of the Federal Territory of Labuan falls within the local jurisdiction of the High Courts in Sabah and Sarawak and not the High Court in Malaya and pursuant to s 25(1) of the CJA the powers of the respective High Courts may also only be enforced within their local jurisdiction; and

(c) the admiralty jurisdiction can only be exercised within the territorial jurisdiction of the respective High Courts as s 24(b) of the CJA, which provides that the High Court shall have the same jurisdiction and authority as is had by the High Court of Justice in England under the UK SCA, must be read consistent with s 23 of the CJA given that the opening words of s 24 states 'Without prejudice to the generality of s 23'.

THE PLAINTIFF'S SUBMISSIONS

[16] On behalf of the plaintiff, Mr Matthew Kurien submitted that the plaintiff rightly brought the admiralty action in rem in the High Court of Malaya at Kuala Lumpur against the vessel by virtue of s 24(b) of the CJA read together with s 23 of the CJA and s 20(1)(a) of the UK SCA and the service of the writ in rem and execution of the warrant of arrest by the sheriff to enforce the plaintiff's claim in rem on the vessel at Labuan by this court are proper as there is no concept or requirement for 'invocation of admiralty jurisdiction' prescribed under s 23 of the CJA or the UK SCA in order for the High Court in Malaya to hear and determine the dispute on the merits in an admiralty action in rem. This submission is premised on the contentions of the plaintiff which in gist are as follows:

(a) s 20 of the UK SCA prescribes the extent of the admiralty jurisdiction of the High Court in respect of the types of claims or subject matter of claims that the High Court may hear and s 21(2) and (3) of the UK SCA prescribes that an action in rem may be brought in the High Court thus conferring the High Court in Malaya with a pre-existing admiralty jurisdiction over the vessel upon issuance of the writ in rem;

(b) there is no concept of 'invocation of admiralty jurisdiction' in Malaysia under ss 20–24 of the UK SCA read together with s 24(b) of the CJA as the statutory words 'The admiralty Jurisdiction of the High Court may be invoked' created under the repealed UK AJA 1956 are no longer present in the UK SCA (ss 20–24) requiring the invocation of admiralty jurisdiction of the High Court against the vessel in an admiralty action in rem or in personam against the owners' company; and

(c) once the writ in rem is issued and the High Court asserts its admiralty jurisdiction against the vessel the service of the writ in rem on the vessel is proper as long as it is served in accordance with the provisions of law particularly s 7(2) of the CJA and art 121(3) of the Federal Constitution.

THE COURT'S ANALYSIS AND FINDINGS

[17] After examining and considering the submissions of the plaintiff and defendant, I find favour with the plaintiff's submissions and hold that the plaintiff rightly brought the admiralty action in rem in High Court in Malaya at Kuala Lumpur against the vessel and the service of the writ in rem and execution of the warrant of arrest by the sheriff to enforce the plaintiff's claim in rem on the vessel at Labuan by this court are proper. The findings which are basis of my conclusion are as stated below.

Proprietary rights are attached on the vessel from the moment of their creation when an action in rem is brought against the vessel by s 21(2) and (3) of the UK SCA

[18] By sub-ss (2) and (3) of s 21 of the UK SCA, an action in rem can be brought against the vessel without considering who the owner of the vessel is at the time the writ in rem is issued, or who would be liable in personam when the cause of action arose. These are proprietary rights attached on the relevant vessel from the moment of their creation. Hence, these claims are truly in rem because they arise and are enforced irrespective of ownership or personal liability criteria unlike claims under s 21(4) of the UK SCA.

[19] The significance of this is that this court can exercise its in rem jurisdiction against the vessel pursuant to s 21(2) and (3) of the UK SCA. Since the plaintiff's action relates to claim or questions under s 20(2)(c) (a mortgage claim), an action in rem may be brought in the High Court against the vessel or property in connection with which the claim or question arises. Despite the vessel not being within the territorial waters or local jurisdiction of either High Court in Malaysia it is proper for the High Court to issue an admiralty writ in rem against the vessel.

[20] The above position gives meaning to the expression 'action in rem may be brought in the High Court' found in s 21 of the UK SCA, specifically s 21(3)

which relates to the instant case. The expression naturally means 'an in rem action may be instituted or commenced in the High Court'. This relates to the initiation of the action only where the effect of the issue of the writ is to crystallise the claim on the ship from the time of issue. This must be so as a plaintiff puts himself in the position of a secured creditor by commencing an action in rem against a ship, even if the writ in rem has not been served or the ship has not been arrested. See *Re Aro Co Ltd* [1980] 1 All ER 1067 (English Court of Appeal).

[21] Similarly when a writ action in rem is filed and issued against a vessel the plaintiff can proceed with an in rem action against the vessel even if there is a change of ownership after issuance of a writ in rem or warrant of arrest but before service or execution thereof on the vessel. As a result, a sale of a ship after issue of the writ did not defeat the claim. See *The Monica S* [1967] 2 Lloyd's Rep 113.

[22] Thus the claim on the ship is crystallised upon service of writ in rem on the vessel.

Jurisdictional facts required to come within the 'local jurisdiction' of either of the High Court in Malaya or High Court in Sabah and Sarawak under ss 23(a)–(d) and 3 of the CJA are not applicable

[23] The reliance of the defendant on s 23 read together with s 3 of the CJA to support the contention of the defendant that the High Court in Malaya has no 'local jurisdiction' to try civil proceedings where the vessel is arrested by the sheriff in the waters of Labuan Federal Territory is in incorrect as the four factors or criteria or jurisdictional facts required to come within the 'local jurisdiction' of either of the High Court in Malaya or High Court in Sabah and Sarawak under ss 23(1)(a)–(1)(d) and 3 of the CJA are not applicable in the admiralty in rem action in the present case.

[24] I now turn to ss 23 and 3 of the CJA. In s 3 of the CJA 'local jurisdiction' is defined to mean in the case of the High Court in Malaya, the territory comprised in the states of Malaya and in the case of the High Court in Sabah and Sarawak, the territory comprising the states of Sabah and Sarawak respectively. Section 23 of the CJA establishes the civil subject matter jurisdiction of the High Courts and lays down four juridictional facts, the satisfaction of any one of the four would allow the High Court in Malaya or the High Court in Sabah and Sarawak to take cognisance of or try the matter at hand.

[25] Given that s 23 read together with s 3 of the CJA determines whether a High Court can try a matter, is it right for the defendant to say that the High

Court in Malaya has no 'local jurisdiction' to try civil proceedings where the writ in rem is served on the vessel and the vessel is arrested by the sheriff in the waters of Labuan Federal Territory, which is within the local jurisdiction of the High Court in Sabah and Sarawak? A

[26] First of all it is undisputed that, for the purposes of ss 3 and 23 of the CJA, neither the High Court in Malaya nor the High Court in Sabah and Sarawak has any 'local jurisdiction' of this matter. In the circumstances of this case: B

(a) the cause of action for the defendant's breach of the mortgage or loan agreement did not arise in Malaysia; C

(b) the 'res' or the vessel against which this admiralty action in rem commenced against is flagged and operated under the laws of the flag state of Marshall Islands; D

(c) the defendant does not reside or has its place of business in Malaysia but at Marshall Islands; and

(d) the facts on which this admiralty in rem proceedings are based exist or to have occurred are not in Malaysia. E

[27] Another relevant point to note that at the time of the plaintiff's filing and issuance of the writ in rem against the vessel on 28 March 2020, the vessel was not yet in the Malaysian territorial waters — it was not yet in the Labuan Federal Territory within the meaning of 'local jurisdiction' of the High Court in Sabah and Sarawak. F

[28] Yet, as explained above, since the plaintiff's action relates to a claim or questions under s 20(2)(c) of the UK SCA (a mortgage claim) read together with s 24(b) of the CJA, an action in rem may be brought in any of the High Courts in Malaysia against the vessel without satisfying any of the jurisdictional facts of s 23 of the CJA, notwithstanding the fact that the vessel involved is foreign as provided under s 20(7) of the UK SCA. G

H

[29] The only argument left for the defendant to support its contention that the High Court in Malaya, where the writ in rem was filed, does not have the jurisdiction to try this matter, is to say that as the vessel is arrested by the sheriff in the local jurisdiction of the High Court in Sabah and Sarawak the High Court in Malaya has no 'local jurisdiction' to try these civil proceedings. The basis of this argument is that according to the defendant, the invocation of the jurisdiction of the High Court in Malaya was done in the local jurisdiction of the High Court in Sabah and Sarawak where the writ in rem was served on the vessel. I

[30] It is my view that the four jurisdictional facts required to come within the 'local jurisdiction' of either of the High Court in Malaya or High Court in Sabah and Sarawak under s 23(1)(a)–(1)(d) and 3 CJA are not applicable to an admiralty in rem action in the present case. Section 3 of the CJA begins with the opening phrase 'In this Act, unless the context otherwise requires,' and then proceeds to define certain terms employed in the CJA. One of the contexts which would exclude the applicability of s 3 of the CJA must be an action in rem brought in the High Court as prescribed by s 21(2) and (3) of the UK SCA, which by virtue of s 24(b) of the CJA the admiralty jurisdiction as the High Court in England as provided in the UK SCA was conferred to the High Courts in Malaysia. Although s 24 of the CJA 1964 contains the opening words of 'Without prejudice to the generality of s 23,' the opening words of s 3 of the CJA render s 23 inapplicable in the context of an admiralty in rem action.

[31] For support of the proposition argued by the defendant that s 3 of the CJA 1964 sets out distinct local (territorial) jurisdiction for the High Courts of Malaya, and Sabah and Sarawak, the defendant relied on the cases of Federal Court cases of *Fung Beng Tiat v Marid Construction Co* [1996] 2 MLJ 413 and *Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor* [2016] 3 MLJ 553. In both cases the Federal Court held that the High Court does not have the power to transfer proceedings from Kuala Lumpur to Sabah as each High Court can only exercise their jurisdiction in different geographical areas. These cases relate to the power of the High Court to transfer proceedings from the High Court in Malaya at Kuala Lumpur to the High Court in Sabah and Sarawak under para 12 of the Schedule to CJA under s 25(1) and (2) (additional powers) in an ordinary in personam civil actions. The issue of jurisdiction in *Fung Beng Tiat* and *Hap Seng Plantations* was predicated on either of the four factors or jurisdictional facts under s 23(1)(a)–(1)(d) of the CJA as to where the dispute arose within its territory to determine which High Court is the appropriate forum to try the civil case. Here, in the present admiralty in rem case, there is no issue of transfer of proceedings. The present action is an admiralty in rem action against a foreign vessel where this court has pre-existing admiralty jurisdiction, where none of the jurisdictional facts or factors under s 23(1)(a)–(d) of the CJA where the dispute has arose within its territory or local jurisdiction has to be determined. I am therefore of the view that these two cases are not relevant for the consideration of the court in relation to the issue before the court in this instant case.

[32] Further, given that proprietary rights of the plaintiff are attached on the vessel from the issuance of the writ in rem, this would be incongruent with the idea that the admiralty jurisdiction of the High Court is invoked only when the

writ in rem is served on the vessel or the warrant of arrest is executed. To say that the admiralty jurisdiction of the High Court is invoked in the said manner proposed by the defendant is to read into s 23(1) of the CJA a requirement of jurisdictional facts or factors based on the location of the invocation of admiralty jurisdiction whether by the service of the writ in rem or execution of the warrant of arrest on the vessel in an admiralty in rem action which is plainly not there. The court must be careful to import into s 23 of the CJA meaning or connotations which had not been expressed. See *Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd* [2003] 5 MLJ 40; [2003] 1 CLJ 450.

[33] As upon issuance of the writ in rem, the High Court in Malaya already has pre-existing admiralty jurisdiction over the vessel. Thus the venue, location or whereabouts of the vessel at the time of the service of the writ in rem or execution of the warrant of arrest by the High Court sheriff on the vessel does not displace or nullify this honourable court's admiralty jurisdiction in the issuance of the writ in rem or warrant of arrest or enforcement thereof in respect of the plaintiff's in rem claim against the vessel.

[34] I therefore hold that contention of the defendant that the invocation of the jurisdiction of the High Court in Malaya was done in the local jurisdiction of the High Court in Sabah and Sarawak where the writ in rem was served on the vessel is wrong.

[35] For the proposition that the admiralty jurisdiction of the High Court can only be invoked by service of the writ in rem and warrant of arrest on a vessel which is located within its territorial jurisdiction the defendant relied on the English case of *The Good Herald* [1987] 1 Lloyd's Rep 236. It was held that unless the property, against which the writ has been issued, is within the jurisdiction and can be served with the writ, that property cannot be arrested. I decline to follow this authority as the English court held this in a limited context where the plaintiff was attempting to serve the writ in rem by substituted service upon the defendants' solicitors when the defendant/owners went into liquidation. The focus of the English court was service must be done on the ship and by no other means as it was an in rem action.

[36] As for *The Nord Sea and Freccia del Nord* [1989] 1 Lloyd's Rep 388 relied on the plaintiff for the same proposition, I also decline to apply this case for the same reason. It is limited for the purposes of articles 21 and 22 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.

[37] The defendant also referred to the Malaysian High Court decision in *En Norske Bank Asa v The Owners of the Ship or Vessel 'Forum Akasaka' and third party* [1998] MLJU 55. In this case, the High Court needed to determine

whether a sum of money should be set aside from the proceeds of sale of the vessel already paid into court to satisfy the second intervenors' claim in the event they obtain judgment on their claim in another suit. Here the High Court held that service in the other suit cannot be effected on the vessel as the vessel is already sold and no longer within the court's jurisdiction and is now out in the open sea and anywhere in the world. I find that decision is not relevant in this application and does not relate to the issues in the present case particularly in relation to the issue whether the court has jurisdiction to hear this case pursuant to the jurisdictional facts requirement under ss 23 and 3 of the CJA as argued by the defendant.

Legislative history of the UK SCA

[38] I stated earlier that the expression 'action in rem may be brought in the High Court' is found in s 21 of the UK SCA, which presecribes the mode of exercise of admiralty jurisdiction, and it naturally means 'an in rem action may be instituted or commenced in the High Court'. This connotes to initiation of the action rather than the process of enforcement or continuation of the action upon service of writ in rem on the vessel. Section 21 of the UK SCA states:

> 21 Mode of exercise of admiralty jurisdiction
>
> (1) Subject to section 22, an action in personam *may be brought in the High Court* in all cases within the admiralty jurisdiction of that court.
>
> (2) In the case of any such claim as is mentioned in section 20(2)(a), (c) or (s) or any such question as is mentioned in section 20(2)(b), an action in rem *may be brought in the high court* against the ship or property in connection with which the claim or question arises.
>
> (3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem *may be brought in the high court* against that ship, aircraft or property. (Emphasis added.)

[39] To appreciate and interpret the provisions of s 21 of the UK SCA, it is essential for us to look at the legislative history of the legal provisions in the UK and some other commonwealth countries pertaining to the exercise of admiralty jurisdictions in their courts.

[40] Prior the UK SCA, the governing legislation relating to the exercise of admiralty jurisdictions in the UK is the Administration of Justice Act 1956 ('the AJA 1956'). This was subsequently replaced and replaced by the UK SCA. The provisions on the mode of exercise of admiralty jurisdiction are as follows:

> 3 Mode of exercise of admiralty jurisdiction
>
> (a) Subject to the provisions of the next following section, *the admiralty*

jurisdiction of the High Court, the Liverpool Court of Passage and any county court *may in all cases be invoked* by an action in personam.

(b) The *admiralty jurisdiction of the High Court may* in the cases mentioned in paragraphs (a) to (c) and (s) of subsection (1) of section one of this Act *be invoked* by an action in rem against the ship or property in question.

(c) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, *the admiralty jurisdiction* of the High Court, the Liverpool Court of Passage and any county court *may be invoked* by an action in rem against that ship, aircraft or property. (Emphasis added.)

[41] Malaysia followed the admiralty jurisdiction model provisions of the UK SCA in respect of our courts' exercise of admiralty jurisdiction by adopting it into our own national law through s 24(b) of the CJA. Another country that did so was Brunei. On the other hand, there are countries that maintained the UK AJA 1956 model admiralty jurisdiction provisions in their national laws such as Singapore and New Zealand.

[42] The provisions on the mode of exercise of admiralty jurisdiction in the Singapore High Court (Admiralty Jurisdiction) Act (Chapter 123) are as follows:

4 Mode of exercise of admiralty jurisdiction

(1) ...

(2) The *admiralty jurisdiction of the High Court may* in the cases mentioned in section 3(1)(a), (b), (c) and (r) *be invoked* by an action in rem against the ship or property in question.

(3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, *the admiralty jurisdiction of the High Court may be invoked* by an action in rem against that ship, aircraft or property. (Emphasis added.)

[43] The provisions on the mode of exercise of admiralty jurisdiction in the New Zealand Admiralty Act 1973 are as follows:

5 Actions in rem

In any case in which there is a maritime lien or other charge on any ship, aircraft, or other property for the amount claimed, *the admiralty jurisdiction of the High Court may be invoked* by an action in rem against that ship, aircraft, or property. (Emphasis added.)

[44] There are distinct differences in the usage of words in these two model provisions, which have different meanings and effect towards bringing an

A action in rem in the High Court, invocation of admiralty jurisdiction of the High Court, issue and service of writ in rem.

[45] In s 3 of the AJA 1956 the expression 'The admiralty jurisdiction ... may be invoked ...' is used in setting out the rules governing the claims in respect of which and the circumstances in which an action in personam and an action in rem would lie. In contrast, s 21 of the UK SCA, which replaced s 3 AJA of the 1956, employs the words 'action may be brought in the High Court' in all subsections. There is thus no usage of the concept 'invocation of the admiralty jurisdiction' in the Malaysian context when such concept is nowhere to be found in the UK SCA ss 20–24.

[46] The omission of the concept of invocation of jurisdiction in s 21 of the UK SCA results, with reference to the bringing of actions in rem and in personam, in there being only two critical points of time: 'when the action is brought' and 'when the cause of action arose'. The words 'Action in rem may be brought' in s 21 of the UK SCA connote that the time when a writ action in rem is filed and issued (instead of service of writ) against a vessel. There is thus no requirement for the admiralty jurisdiction of the High Court to be invoked by an action in rem against the ship or property under ss 23 or 24 of the CJA read together with ss 20–24 of the UK SCA.

[47] The defendant referred to the decisions in *'The Fierbinti'; Romline SA Shipping Co v Owners of Cargo lately laden on board the ship or vessel 'Fierbinti'* [1994] 3 SLR 864 by the Singapore Court and *Wei Hsing Food (S) Pte Ltd v The owners or demise charterers of the ship or vessel 'The Neptune' and another action* [2005] 5 MLJ 702 (a Malaysian decision which followed *The Fierbinti*) to support the submission that the admiralty jurisdiction of the High Court is invoked when the writ in rem is issued or filed. The expression 'invocation' of the admiralty jurisdiction the Singapore High Court (Admiralty Jurisdiction) Act (Chapter 123), which specifically adopted or refers to the words 'invocation of admiralty jurisdiction' as in the UK AJA 1956 model, concerns the status of action in rem when it was continuing following the service the writ in rem and warrant of arrest on the vessel. As these words are not present in the UK SCA s 21 theses decided cases emanating from the Singapore Courts' interpretation of the words 'invocation of admiralty jurisdiction of the High Court' or its concept including the decisions in *The Fierbinti* and *The Neptune* are distinguished and not followed.

[48] The cases of *The Fordeco Nos 12 and 17; the owners of and all other persons interested in the ships Fordeco No 12 and Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, the owners of the ship MV Xin Hua 10* [2000] 1 MLJ 449 (FC) and *The Indian Endurance (No 2); Republic of India and another v India Steamship Co Ltd* [1997] 4 All ER 380 (HL) were also referred to by the

defendant also to support the proposition that the admiralty court's jurisdiction was invoked only when the writ in rem and warrant of arrest was served on a vessel.

[49] In *The Fordeco*, the question before the court was whether the admiralty jurisdiction of the High Court in Malaya and Sabah and Sarawak can be validly invoked when the plaintiff had issued and served a writ in rem and warrant of arrest against two vessels owned by a defendant in respect of the same claim. Although the Federal Court found that the jurisdiction is invoked when the writ is served and the warrant of arrest executed on one of the named ships this is applicable for the limited situation provided in s 21(8) of the UK SCA where a plaintiff is limited to serving the writ on any one of the defendant's ships when the writ names more than one ship or two or more writs each naming a different ship, which is the statutory embodiment of the 'one claim, one ship' principle. The language of 'invocation of jurisdiction' was used without applying the statutory effect of the UK SCA. This case is distinguished from the present case where the issue is whether the court has jurisdiction to hear this case pursuant to ss 23 and 3 of the CJA.

[50] As for *The Indian Endurance* case (also known as the '*The Indian Grace*' case, after the sister ship of *The Indian Endurance*), the House of Lords considered whether an action in rem could proceed where a foreign judgment in personam had been obtained against the owners of the vessel on the same cause of action by virtue of s 34 of the UK Civil Jurisdiction and Judgments Act 1982. The House of Lords held that when the admiralty court is seized with jurisdiction by the service of a writ there is a bar to the action in rem. In my considered view, this decision is limited to the interpretation s 34 of the Civil Jurisdiction and Judgments Act of 1982 where the court had to consider whether the action in rem issued by the plaintiffs was an action 'between the same parties, or their privies' within the meaning of s 34. I distinguish *The Indian Grace* from the present case where the predominant issue is whether local jurisdiction of the High Court as provided ss 23 and 3 of the CJA is applicable for the court to have jurisdiction over this matter.

Service and execution of the writ in rem and warrant of arrest by the High Court sheriff through the Labuan Court bailiff on 30 March 2020 in the waters of Labuan Federal Territory

[51] The writ in rem and warrant of arrest in this action were served and executed by the Labuan Court bailiff, one Mr Nerwan Shah bin Wastie on 30 March 2020 at 7.40pm at the Labuan Federal anchorage waters (layup anchorage), in the waters of Labuan Federal Territory by duly affixing the sealed copy of the writ in rem and warrant of arrest on the suitable part of the defendant's vessel's superstructure. This was done on the direction by the Chief

Registrar of the Federal Court Malaysia with the full knowledge and/or cognizance of the Registrar of the High Court in Sabah and Sarawak at Kuching.

[52] There was is no argument that the writ in rem and warrant of arrest in this action were served and executed in accordance with O 70 rr 7, 9 and 10 of the ROC 2012 which provide the manner in which the admiralty writ in rem and warrant of arrest may be served and executed by the High Court sheriff or his substitute on a vessel. In summary, these rules provide that the writ in rem shall be served and the warrant executed on the ship named in the writ by the Sherriff or his officer by affixing the warrant or writ for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure.

[53] Both the writ in rem and warrant of arrest were served and executed or enforced on the vessel in the Labuan waters on 30 March 2020 by the bailiff of the Labuan High Court, an officer of the Sherriff in the High Court of Sabah and Sarawak at Labuan Federal Territory, who has the power to serve and execute the writ in rem and warrant of arrest on the vessel within its jurisdiction or territorial area in accordance with s 12 of the CJA.

[54] The writ in rem and warrant of arrest although issued out of the High Court in Malaya was served and executed in the waters of Labuan. In my view, despite not being served and executed within the territorial jurisdiction of the High Court in Malaya, the service and execution of the writ in rem and warrant of arrest is proper as by virtue of s 7(2) of the CJA, all writs, summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal, issued or made by or by the authority of the court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malaysia.

[55] The word 'jurisdiction' in s 7(2) of the CJA refers to the jurisdiction of the Federal Court, Court of Appeal and the two High Courts and not the 'local jurisdiction' as defined in s 3 of the CJA. The plaintiff's claim under the writ in rem is a cause or matter within the admiralty jurisdiction of this court. Further art 121(3) of the Federal Constitution provides that any process of the courts may be executed or enforced in any part of the Federation accordingly. Once the court sealed writ in rem and warrant of arrest are expressed to be issued in the name of the Chief Judge of the High Court in the name of Yang di-Pertuan Agong pursuant to s 7(1) of the CJA, both the writ in rem and warrant of arrest shall have full force and effect and may be served or executed anywhere within Malaysia.

[56] The Federal Court case of *Pantai Bayu Emas Sdn Bhd & Ors v Southern Bank Bhd* [2009] 3 MLJ 745; [2009] 2 CLJ 630 demonstrates the working of

s 7(2) of the CJA read with art 121(3) of the Federal Constitution in an instance where a party sought to have a vesting order granted in the High Court of Malaya enforced in local jurisdiction of the High Court at Kuching. The Federal Court held that sub-s (2) of s 7 of the CJA stipulated that all writs, summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal, issued or made by the authority of the court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malaysia. Further, the status of s 7(2) of the CJA was further elevated and enhanced by art 121(3) of the Federal Constitution which clearly provided for any order or judgment to have full force and effect throughout the territories of the federation, ie, Malaya, Sabah and Sarawak and enabled federal law to provide for one High Court to act in aid of the other. It was also held in *Pantai Bayu Emas* also held that s 23(1) of the CJA did not deal with nor was it intended to regulate the efficacy of a vesting order and did not exclude the operation of an order, made by one High Court, in the 'local jurisdiction' of another High Court.

[57] Although dealing with a vesting order, by way of analogy, *Pantai Bayu Emas* is applicable to the instant case which is in respect of a writ, referred to in s 7(2) of the CJA, which is a process of the court referred to in the art 121(3) of the Federal Constitution. Section 23(1) of the CJA does not deal with nor is it intended to regulate the effect of the sealed writ in rem and warrant of arrest issued by this court in the Labuan waters. Further, it does not preclude or exclude the enforcement or operation of the writ in rem and warrant of arrest on the vessel, made by High Court in Malaya (Admiralty) at Kuala Lumpur, in the 'local jurisdiction' of the High Court in Sabah and Sarawak.

[58] The defendant argues that *Pantai Bayu Emas* is not applicable in the instant case because the High Court in Malaya had the pre-existing jurisdiction under s 23(1) of the CJA 1964 to grant the vesting order whereas in the instant case the High Court in Malaya does not have admiralty jurisdiction over the vessel until that jurisdiction is invoked. I do not agree. As discussed earlier, upon issuance of the writ in rem, the High Court in Malaya already has pre-existing admiralty jurisdiction over the vessel without the need for the admiralty jurisdiction of this court to be invoked by serving and executing the writ in rem and warrant of arrest on the vessel. Therefore, the writ in rem was enforceable anywhere in Malaysia under s 7(2) of the CJA and art 121(3) of the Federal Constitution.

CONCLUSION

[59] Premised on the foregoing reasons, having considered the submission of the parties and the relevant materials before the court, the court finds that the defendant failed to show why this court does not have the admiralty

jurisdiction to hear the matter relating to the plaintiff's claim and why the arrest of the vessel on 30 March 2020 is wrongful. As I have found that this court has the admiralty jurisdiction to hear the matter relating to the plaintiff's claim and the arrest of the vessel is proper, I do not have to proceed to the next step of the inquiry relating to damages suffered by the defendant as a result of the purported wrongful arrest by the plaintiff. The plaintiffs' application in encl 13 is therefore dismissed with costs of RM15,000.

Defendant's application in encl 13 dismissed with costs of RM15,000.

Reported by Mohd Kamarul Anwar